



The notion of ‘employer’: Towards a uniform European concept?

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Abstract

The growth in multilateral working relationships (e.g. agency work, chains of sub-contracting and corporate groups) is causing Member States to increasingly scrutinise their traditional, contractual approach to the notion of ‘employer’. So far, little attention has been paid to the boundaries and limits that EU law sets when defining the employer. The lack of attention may have come to an end with the recent *AFMB* judgment, in which the Court ruled, for the first time, that the concept of employer in a provision of EU law had to be given an autonomous and uniform interpretation throughout the EU. Starting from the *AFMB* judgment, the author analyses the concept of employer in EU law. The author finds that the concept of employer in EU law can be described as ‘uniform in its functionality’: in EU law, the national concept of the employer is never absolute, but the circumstances and the way in which the national concept must be set aside depend on the context and the objective of the European legislation in question. Through this functional approach, EU law partly harmonises the various national approaches to the concept of the employer. Nevertheless, a lack of specific reasoning on the part of the Court may grant the Member States considerable leeway to uphold their own views on the concept.

Keywords

Concept of employer, European law, labour law, market freedoms, posting

Introduction

Defining the concept of the ‘employee’ is an age-old legal problem. The flip side of that problem, namely the question of who should be considered the ‘employer’ of the respective employee, has historically received far less attention. The lack of attention stems from a traditional, singular perception of the employer: the employer is the entity with whom the employee has concluded the

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employment contract. Today's reality, however, is far more complex. An increasing number of work arrangements (e.g. agency work, corporate groups and chains of sub-contracting) involve a multitude of parties in the employment relationship. As a result, the legal nature of the employer has emerged as an issue of its own right¹ and legal scholars and policymakers are increasingly scrutinising or even rethinking their approach to the concept of employer.² So far, this thought exercise has mostly been a national one. In stark contrast with the concept of the employee – over which the influence of EU law is widely recognised – little attention has been paid to the requirements and boundaries that EU law sets when defining the employer. The lack of attention is understandable, since the number of judgments the Court of Justice of the EU (hereafter: 'the Court') has devoted to the worker concept far outweighs its judgments on the notion of the employer.³ However, in its recent decision in the case of *AFMB Ltd and Others v Raad van bestuur van de Sociale verzekeringsbank*⁴ (hereafter: '*AFMB*') the Court considered, for the first time, how the concept of the employer in EU law is to be understood on a more fundamental level.

Various social policy Directives, like the Working Time Directive,⁵ the Collective Redundancies Directive⁶ and the recent Directive on Transparent and Predictable Working Conditions,⁷ connect certain rights or obligations to the status of 'employer'. As a result, EU law has the potential to limit the autonomy of the Member States to (re)define the employer. This contribution therefore explores the engagement of EU law with the concept of employer and analyses the contents of the concept of employer in EU law. The *AFMB* judgment is taken as the starting point, followed by an analysis of that judgment in a wider context. The analysis is threefold. First, the criteria for employership set out by the Court in *AFMB* are scrutinised. Next, the extent to which these criteria can be exported to other parts of the EU social *acquis* is examined, i.e. the extent to which the Court has created a uniform definition of the employer throughout EU law. Finally, it is discussed what room the EU approach to the concept of employer leaves the Member States to maintain or adopt a diverging definition of the employer when applying or implementing EU law. Throughout the analysis, the relation between *AFMB* and earlier Court rulings on the concept of the employer is discussed. Moreover, references are made to various diverging concepts of employer in national law. The latter exercise aims to illustrate the potential impact of the EU approach to the notion of the employer on Member States. The contribution does not, however, aim to give a comprehensive overview of the concept of employer in all 27 Member States.

1. This was already noted by Deakin in 2001: Deakin, S. (2001), 'The Changing Concept of the 'Employer' in Labour Law', *Industrial Law Journal* (30), p. 72.

2. For recent studies on the notion of employer, see Prassl, J. (2015), *The concept of the employer* (Oxford, OUP); Corazza, L. & Razzolini, O. (2015), 'Who is an Employer', WP CSDLE 'Massimo D'Antona'.INT-109/2014; Blanpain, R. & Hendrickx, F. (eds.) (2017), *The Notion of Employer in the Era of the Fissured Workplace* (Alphen aan den Rijn, Kluwer Law International B.V.); Countouris, N. & De Stefano, V. (2019), *New trade union strategies for new forms of employment* (Brussels, ETUC), pp. 61-63; Eindrapport van de Commissie Regulering van Werk (2020), *In wat voor land willen wij werken? Naar een nieuw ontwerp voor de regulering van werk*, pp. 42-44, 72-76. See also *Italian Labour Law e-Journal* 2020 (13) 1, a special issue dedicated to the concept of employer.

3. The most famous example of the latter being Case C-242/09, ECLI: EU: C:2010:625 (*Albron*), where the Court created the concept of the 'non-contractual employer' for the sake of the Transfer of Undertaking Directive (Directive 2001/23/EC).

4. Case C-610/18, ECLI: EU: C:2020:565 (*AFMB*).

5. Directive 2003/88/EC.

6. Directive 98/59/EC.

7. Directive (EU) 2019/1152.

This contribution does not, as such, discuss the employer status of platforms. The question of the extent to which platforms can be qualified as employers (in EU law or otherwise) requires an in-depth analysis of the many different characteristics and modalities of platform work.⁸ Such an analysis goes beyond the scope of this contribution.

AFMB

Factual background and questions referred

The *AFMB* judgment deals with the application of Regulation 883/2004 on the coordination of social security systems⁹ to the so-called (and in the Netherlands somewhat notorious)¹⁰ ‘Cyprus route’ scheme. In short, the Cyprus route scheme involves the intermediation of a Cypriot company, who concludes employment contracts with workers residing in the Netherlands and then places them at the disposal of Dutch companies. The Cyprus route scheme aims to bring the workers under the scope of Cypriot law. As the level of social protection in Cyprus is relatively low, this leads to significant cost savings, including social security contributions.¹¹ To this end, the Cypriot company AFMB entered into contracts with several Dutch transport companies and lorry drivers resident in the Netherlands. AFMB made each driver available to one of the Dutch transport companies for an indefinite period of time. The driver was recruited in the Netherlands by the Dutch transport company or was in paid employment with that company before being engaged by AFMB. On its website, AFMB advertises its services, *inter alia*, as a means for transport companies to cut costs and gain a competitive advantage.¹²

From a social security perspective, AFMB based the applicability of Cypriot law on Article 13(1)(b) Regulation 883/2004. The drivers in question were employed in various EU and EFTA Member States and did not perform substantial activities in their Member State of residence (the Netherlands). In this situation, Article 13(1)(b) refers to the social security system of the Member State where the registered office of the ‘employer’ is situated. As the explicit counterparty to the employment contracts, the Cypriot company AFMB contended that Cypriot social security law

8. For such endeavours, see Prassl, J. & Risak, M. (2016), ‘Uber, taskrabbit, and co.: Platforms as employers? Rethinking the legal analysis of crowdwork’, *Comparative Labor Law & Policy Journal* (37); Risak, M. (2018), ‘Fair Working Conditions for Platform Workers: Possible Regulatory Approaches at the EU Level’, available at <https://library.fes.de/pdf-files/id/ipa/14055.pdf>, pp. 10, 15-16; De Stefano, V. & Wouters, M. (2019), ‘Triangulaire arbeidsrelaties in de platformeconomie: een voorstel tot een vermoeden van uitzendbureau’, *Arbeidsrechtelijke Annotaties* (18); see also Hauben, H., Lenaerts, H. & Kraatz, S. (2020), ‘Platform economy and precarious work: Mitigating risks’, Policy Department for Economic, Scientific and Quality of Life Policies. Directorate-General for Internal Policies, PE. 652.721, p. 8.

9. Regulation (EC) No 883/2004. The Court clarified that the considerations in *AFMB* apply equally to the predecessor of Regulation 883/2004, Regulation (EEC) No 1408/71, which still applied to the EFTA States during the time in which the lorry drivers performed part of their work there. Regulation 1408/71 was not discussed further here.

10. For the various legal techniques used by Dutch courts to deal with the Cyprus route scheme prior to the accession of Cyprus to the EU, see Van den Berg, L. (2015), ‘Concernwerkgeverschap in de werknemersverzekeringen’, in: Beltzer, R.M., Laagland, F.G. & Van den Berg, L., *Concernwerkgeverschap, Preadvies Levenbach/VvA* (Deventer, Kluwer), p. 142 ff.

11. Originally, the Cyprus route scheme had a fiscal background; Roks, E.C.N. (1984), ‘De Cyprusconstructie exit’, *Weekblad Fiscaal Recht* (5646), p. 868 ff.

12. <https://www.afmb.eu>. See also European Parliament, Parliamentary questions 23 February 2016, Question for written answer E-001515/2016 to the Commission, Agnes Jongerius (S&D), PE 577.847.

applied to the drivers. However, the *Raad van bestuur van de Sociale verzekeringsbank* (Board of Management of the Dutch Social Insurance Bank) decided differently. It considered that the Dutch transport companies, not AMFB, were the employers of the drivers within the meaning of Article 13(1)(b), with the result that Dutch social security legislation applied. After an unsuccessful appeal by AFMB before the Amsterdam District Court, the *Centrale Raad van Beroep* (Dutch Higher Social Security and Civil Service Court, hereafter: 'CRvB') held that the applicable social security law depends on the interpretation of the concept of 'employer' in Article 13(1)(b) and referred three preliminary questions to the Court. The CRvB asked, firstly, who should be considered to be the employer within the meaning of Article 13(1)(b): the contractual employer, AFMB, or the transport company, at whose disposal, according to the CRvB, the driver was entirely, and which recruited the driver, exercised actual authority over the driver and which bore the actual wage costs. Secondly, if AFMB was to be considered the employer, the CRvB inquired whether the requirements laid down in Article 12(1) Regulation 883/2004 could be applied by analogy to Article 13(1)(b). Article 12(1) concerns a different situation (temporarily posting a worker to another Member State) and requires 1) an organic link between the employer and the worker and 2) that the employer carries out significant activities in the Member State of establishment.¹³ The CRvB thought that, if it could apply these criteria by analogy to Article 13(1)(b), it could reject the applicability of Cypriot law due to the lack of an organic link between AFMB and the drivers.¹⁴ Thirdly, if AFMB were to be considered the employer and the additional criteria could not be applied by analogy, the CRvB asked whether Article 13(1)(b) could be disapplied on the ground that the use of the Cyprus route scheme constituted abuse of EU law, as the sole objective was to bring workers under the scope of Cypriot social security law via the connecting factor of the 'employer'.

Opinion of Advocate General Pikamäe

In his elaborate and worthwhile Opinion,¹⁵ Advocate General Pikamäe addressed all three questions referred by the CRvB. He remarked that the concept of employer is not defined by Regulation 883/2004, nor does it expressly refer to the law of the Member States to define the employer. As a result, the uniform application of EU law and the principle of equality require that the concept of employer must be given an autonomous and uniform interpretation, by taking into account the context of Article 13(1)(b) and the objective of Regulation 883/2004. A uniform interpretation is all the more necessary, since the notion of employer in Article 13(1)(b) is the connecting factor that aims to determine a single State's social security legislation as the applicable law. The Advocate General considered that the employer should be identified on the basis of a case-by-case examination of all relevant circumstances and by using objective criteria. Relying solely on the existence of a contractual relationship would not take due account of the complexity of today's working relationships and would risk circumvention of the objective conflict of law system established by Regulation 883/2004.

To identify the relevant criteria, the Advocate General focused on establishing an employment relationship. He remarked that to date the Court has paid more attention to the role of 'worker' than to the role of 'employer'. Nevertheless, he reasoned that the interpretation of the worker concept is

13. See e.g. Case C-202/97, ECLI: EU: C:2000:75 (*FTS*).

14. CRvB 20 September 2019, ECLI: NL: CRVB:2018:2878, paras. 7.2.2-7.2.3.

15. Opinion of Advocate General Pikamäe in the *AFMB* case (ECLI: EU: C:2019:1010) (hereafter: '*AFMB* (Opinion)').

equally relevant when identifying the employer, since being a worker necessarily implies the existence of a hierarchical relationship with an employer. To determine the existence of a hierarchical relationship and, thus, the identity of the employer, the Advocate General drew inspiration from the Court's case law on social security law, employment relationships generally and private international law. In the Court's case law on the coordination of social security, the Advocate General found that one must look at the worker's actual employment situation and not merely at the contractual documents. Specifically, the Advocate General inferred from the Court's ruling in *Manpower*¹⁶ (which concerned the aforementioned 'organic link' in the predecessor¹⁷ of Article 12(1) Regulation 883/2004) that the employer is the party who is responsible for engaging the worker, paying his salary and sanctioning and dismissing him. From the Court's case law on employment relationships, the Advocate General inferred that a hierarchical relationship is characterised by factual powers of management and supervision. Moreover, he referred to the *Albron* ruling in which the Court held (for the purpose of the Transfer of Undertaking Directive) that the undertaking to which a worker is posted may be an employer despite the absence of a contractual relationship.¹⁸ Finally, he found further support for an objective approach in the Court's case law on private international law. Specifically, he referred to the Court's ruling in *Voogsgeerd*,¹⁹ where the Court held that, when assessing whether a company is the employer which engaged the worker, which is a connecting factor to determine the applicable employment law in Article 8 Rome I Regulation,²⁰ the national court must consider all the objective factors to assess whether the actual employment status differs from the terms of the contract. These viewpoints led the Advocate General to conclude that the contractual relationship between the drivers and AFMB was only indicative in nature and that the identity of the employer should reflect the reality of the employment relationship. On the basis of the findings of the CRvB – the driver was fully available to the Dutch transport company, which determined his engagement, working conditions, activities and dismissal, bore the actual wage costs and was often the employer of the driver before the involvement of AFMB – the Advocate General concluded that the power of management and supervision lay with the Dutch transport company who should therefore be considered to be the employer of the driver within the meaning of Article 13(1)(b). Consequently, Dutch social security legislation applied.

Considering that the Court may nonetheless identify AFMB as the employer, the Advocate General also addressed the two other preliminary questions. As to the second question, he concluded that in light of the aforementioned considerations there was no organic link between AFMB and the drivers (without commenting on whether this criterion applies to Article 13(1)(b)). With regard to the second criterion of Article 12 (significant activities in the Member State of establishment), the Advocate General remarked that it cannot be read into Article 13(1)(b), since, *inter alia*, Article 13(1)(b) merely requires that the employer is established in that Member State. Thus, the analogic approach suggested by the CRvB could not be followed. As to the third question, the

16. Case C-35/70, ECLI: EU: C:1970:120 (*Manpower*).

17. Council Regulation No 3 on social security for migrant workers, Art. 13(1)(a).

18. *Supra* n. 3. Both the EU legislator and the Court often equate the concept of 'undertaking' with the natural or legal person that owns that undertaking (the entrepreneur). For the sake of consistency, this equation is followed throughout this contribution. Nevertheless, it is clear that an undertaking cannot have the legal status of 'employer'; only the natural or legal person owning the undertaking can.

19. Case C-384/10, ECLI: EU: C:2011:842.

20. Regulation (EC) No 593/2008.

Advocate General was inclined to conclude that the Cyprus route scheme abused EU law, since AFMB would only formally fulfil the conditions attached to the status of ‘employer’ in Article 13(1)(b) and the intermediation of AFMB appeared to have had the aim of excluding the drivers from the scope of Dutch social security legislation. Thus, in his view, even if AFMB were to be considered the employer, AFMB could not rely on Article 13(1)(b) to establish a connection to Cypriot social security law.

Judgment of the Court

The Court stressed that the main objective of Regulation 883/2004 is to ensure that only one social security system applies to the employment contract. Since Regulation 883/2004 does not explicitly leave it up to the Member States to define the employer, this objective, together with the requirements of the uniform application of EU law and the principle of equality, requires that the connecting factor of the employer in Article 13(1)(b) must be given an autonomous and uniform interpretation. This interpretation must be sought, taking into account the usual meaning of the employer as well as the context of and the objective pursued by Regulation 883/2004. As to its usual meaning, the Court found that the relationship between employer and employee implies the existence of a hierarchical relationship. With regard to the context of the employer in Regulation 883/2004, the Court ruled that the correct application of the Regulation requires that the institution concerned bases its findings on the employed person’s actual situation, whatever the wording of the contractual documents. From its case law on the ‘organic link’ of the posting provision it inferred that the employer is the undertaking with the actual authority over the employee, which must be deduced from all the circumstances of the employment concerned. Like the Advocate General, the Court referred to *Manpower*, where the hierarchical relationship resulted from the fact that the employer paid the worker’s wages and could dismiss the worker. On the basis of these considerations, the Court concluded that to identify the employer it is necessary to take account of the objective situation of the worker and of all the circumstances of the worker’s employment. Though the existence of a contractual relationship has indicative value, it remains necessary to take account of how the obligations under that contract are performed in practice. Accordingly, it is necessary to identify which entity exercises the actual authority over the worker, bears the actual wage costs and has the actual power to dismiss the worker. The decision to opt for a factual rather than a contractual approach is supported by the objectives of Regulation 883/2004, as it ensures that the workers are subject to the legislation of one single Member State, prevents abuse of the connecting factor of the ‘employer’, and leads to legal certainty. Finally, like the Advocate General, the Court inferred from the findings of the CRvB that, although it was for the referring court to determine, the Dutch transport companies seemed to be the respective employers of the drivers within the meaning of Article 13(1)(b) Regulation 883/2004, with the result that Dutch social security legislation applied.

As the Dutch transport companies appeared to be the employers of the drivers, the Court saw no need to answer the second and third question.

The definition of employer in AFMB

General remarks

AFMB was the first case – with regard to Regulation 883/2004 or otherwise – in which the Court explicitly decided that the concept of employer in a provision of EU law must be given an

autonomous and uniform interpretation. The choice for a uniform concept in Regulation 883/2004 is logical. As both the Advocate General and the Court emphasised, allowing Member States to maintain their own approach to the employer would jeopardise the primary objective of Regulation 883/2004, to ensure that a worker is subject to the social security system of no more and no less than one Member State. Allowing diverging interpretations of the concept of the employer for the purpose of Regulation 883/2004 could lead to the conclusion that there are multiple employers (e.g. AFMB in Cypriot law and the Dutch transport company in Dutch law), with the result that the connecting factor of the employer would refer to multiple social security systems and the Dutch transport company would be liable for the same social security contributions in the Netherlands as AFMB would be in Cyprus. In this light, it is hardly surprising that the European legislator did not leave it up to the Member States to define the concept of employer in Regulation 883/2004.

To establish a hierarchical relationship, the Court focused on identifying the entity that exercises the actual authority over the worker, actually bears the relevant wage costs and has the actual power to dismiss that worker.²¹ The element of ‘authority’ is to be interpreted broadly and must be deduced from all the circumstances of the employment concerned. It is not limited to exercising the power of direction and supervision, but also encompasses questions such as who recruited the worker and who can in fact use the worker.²² The two other elements, paying wages and having the power of dismissal, seem to stem from the Court’s reference to *Manpower*, where it found that a hierarchical relationship for the purpose of the organic link-criterion resulted from these two elements.²³ Interestingly, in a different case, the Court held that *Manpower* was, in fact, about establishing ‘authority’.²⁴ With this in mind, the weight that is to be attached to the Court’s *separate mention* of paying wages and having the power of dismissal should not be overstated. These circumstances are not on equal footing with, and can even be seen as a part of, the more comprehensive notion of authority. This view is supported by the Court’s emphasis that it is necessary to take account of all the circumstances of the worker’s employment²⁵ and that, whilst assessing the circumstances in *AFMB*, no single circumstance (including the payment of wages and the power of dismissal) seemed to carry more or fewer weight than another.²⁶

Thus, identifying the employer within the meaning of Article 13(1)(b) Regulation 883/2004 requires an assessment of all relevant circumstances. This holistic approach inevitably begs the question of how the employer should be identified if not all circumstances point towards the same entity. This question did not arise in *AFMB*, since all material employer functions were exercised by the Dutch transport companies. However, in practice, the circumstances are often less unequivocal. Employer functions are shared by multiple entities on a regular basis.²⁷ The question is whether the holistic ‘*AFMB* test’ can be given a more specific interpretation and whether some circumstances carry more weight than others. In this regard, three observations are made. These observations concern the relevance of the Court’s case law on the concept of the worker (section 3.2), the guidance that may be inferred from European Directives on multilateral working relationships (section 3.3) and the significance of abuse (section 3.4).

21. *AFMB*, para. 80. See also paras. 61, 75.

22. *AFMB*, paras. 55, 77-78.

23. *AFMB*, para. 56.

24. *FTS* (*supra* n. 13), para. 24, to which the Court refers in *AFMB*, para. 55.

25. *AFMB*, paras. 52-60.

26. *AFMB*, paras. 76-80.

27. See *supra* n. 2.

Blurring the boundaries between the concept of ‘worker’ and the concept of ‘employer’

A first observation concerns the question of the extent to which the Court’s comprehensive case law on the concept of the worker may be of use when identifying the employer. It is clear from his Opinion in *AFMB*, that Advocate General Pikamäe favours an analogic approach. He reasoned that the worker question and the employer question are essentially the same: the counterparty to the hierarchical relationship that is necessary to grant a person worker status (commonly referred to as ‘subordination’) is the employer of that worker. The Court did not explicitly follow or refer to this line of thought. This might imply that the Court regards the worker question and the employer question as two separate matters entirely. However, there is logic in the Advocate General’s approach. In national law, although establishing the status of ‘employee’ and ‘employer’ regularly constitute separate tests, the two tests often converge significantly.²⁸ Similarly, from an EU law perspective there is little reason why the comprehensive guidance of the Court on the notion of subordination cannot be of use when identifying the employer. For example, questions like whether the working person shares in the economic risk of the entity and is incorporated into the undertaking of that entity, which are relevant factors to establish subordination,²⁹ can be regarded as equally relevant (after establishing that the working person is indeed a worker) to assess the employer status of that entity in case of multiple candidates.

The worker criteria cannot, however, be applied to the employer concept one-on-one. The worker concept revolves around establishing the existence of a hierarchical relationship in a bilateral relationship. In contrast, an overly literal application of the worker criteria to the employer concept in a *multilateral* relationship could lead to the conclusion that there are multiple employers: on the basis of the worker criteria, *every* entity in a multiparty working arrangement, under whose direction a worker works for remuneration, could be considered to be an employer of that worker. This reasoning was used recently by the Amsterdam Court of Appeal.³⁰ The case revolved around the question of whether a Dutch mother company qualified as the ‘employer’ of the employees of its Spanish daughter company within the meaning of Dutch insolvency law. This question mattered, since Dutch insolvency law grants employee claims a preferential status in the case of insolvency of their employer.³¹ The Court of Appeal drew inspiration from the Court’s worker criteria and concluded that, besides the hierarchical relationship between the employees and the Spanish daughter company, a hierarchical relationship had also existed between the employees and the Dutch mother company. As a result, the Spanish and the Dutch company qualified as co-employers for the sake of Dutch insolvency law. Regardless of the merits of this particular case, it is important to point out that the Advocate General did not apply the worker criteria in this manner in *AFMB*. The definition of employer in *AFMB* revolved around identifying the one, ‘true’ employer. In *AFMB*, the existence of a hierarchical relationship was clear, but the question was to which of two distinct candidates that single hierarchical relationship could be attributed. The question is, as it were, to whom, in a situation in which several entities exercise

28. Corazza & Razzolini (*supra* n. 2), p. 8; Jansen, C.J.H. (2002), ‘Het ontstaan van een arbeidsovereenkomst: de Hoge Raad op het scherp van de snede’, *Arbeidsrechtelijke Annotaties* (1), p. 48.

29. E.g. Case C-3/87, ECLI: EU: C:1989:650 (*Agegate*), para. 36; Case C-22/98, ECLI: EU: C:1999:419 (*Becu*), para. 26. See, for an overview, Risk, M. & Dullinger, T. (2018), *The concept of ‘worker’ in EU law. Status quo and potential for change* (Brussels, ETUI), para. 2.7.

30. Amsterdam Court of Appeal 12 November 2019, ECLI: NL: GHAMS:2019:4062.

31. Art. 40(2) Dutch Insolvency Act; Art. 3:288(e) Dutch Civil Code.

some kind of authority over the employee, that authority can primarily be attributed. When answering *this* question, the Court's guidance on the notion of subordination may be of use. The criteria for employership in *AFMB* do not, however, lead to the conclusion that there are multiple employers for one and the same obligation.³²

Guidance in the Temporary Agency Work Directive and the Posted Workers Directive

Inspiration as to how to interpret the criteria for employer status as set out in *AFMB* can also be drawn from European Directives that regulate triangular working relationships. These Directives reflect the recognition in many Member States³³ that, even though there is only one legal employer, some employer functions can be shared by multiple entities. Besides the posting provision in Article 12 Regulation 883/2004, from which the Court drew heavy inspiration in *AFMB*,³⁴ the most prominent examples are the Temporary Agency Work Directive³⁵ (hereafter: 'TAWD') and the Posted Workers Directive³⁶ (hereafter: 'PWD'). In short, both Directives aim to strike a balance between worker protection and the legitimate use of flexible work by creating a suitable regulatory framework for triangular employment relationships.³⁷ They do not define the employer, but offer a clear indication that in triangular working arrangements the contractual employer is the legal employer. This indication is best illustrated by the explicit objective of the TAWD to recognise temporary work agencies as employers.³⁸ With this in mind, *AFMB* can be given a more specific interpretation by taking a closer look at the working arrangements that are regulated in these Directives. It seems likely that in a situation which is covered by either the TAWD or the PWD – and which is thus seen as a legitimate triangular working relationship at the EU level – the *AFMB* test identifies the contractual employer as the employer.

The TAWD applies to any natural or legal person who engages workers in order to assign them to another undertaking to work there temporarily under the supervision and direction of that undertaking.³⁹ Similarly, in a cross-border context the PWD applies to the temporary posting of a worker to another undertaking in another Member State to work under the control and direction of that undertaking.⁴⁰ It can be inferred from these definitions that delegating the power of (work-related)⁴¹ supervision and direction to another entity is legitimate, and that workers may even be engaged for the purpose of being assigned,⁴² on the condition that the assignment is of a temporary

32. This does not imply there can never be two employers in EU law. See *infra* para. 4.

33. Corazza & Razzolini (*supra* n. 2), pp. 5-7; Blanpain & Hendrickx (eds.) (*supra* n. 2). A similar recognition flows from ILO Convention 181 (1997), see De Stefano & Wouters (*supra* n. 8), pp. 15-16.

34. In fact, it can be inferred from *AFMB* that the existence of an 'organic link' entails that the undertaking making the posting is, and remains to be, the 'true' employer during the period of posting.

35. Directive 2008/104/EC.

36. Directive 96/71/EC, as amended by Directive (EU) 2018/957.

37. Preamble 9-12 TAWD; Preamble 5-6, 13 PWD. The TAWD defines a general framework applicable to the working conditions of temporary agency workers; the PWD regulates which law applies to the employment contract of cross-border posted workers.

38. Art. 2 TAWD.

39. Art. 3(1)(b) TAWD.

40. Art. 1(3)(c) PWD; see also Case C-18/17, ECLI: EU: C:2018:904 (*Danieli*), para. 27 and case law cited.

41. In general, two types of employer directions can be distinguished: work-related directions and disciplinary directions. Temporary agency work concerns the delegation of the power of work-related direction.

42. See also *Manpower* (*supra* n. 16), para. 14.

nature.⁴³ As a result, when identifying the employer, not too much weight can be attached to the circumstance that the power of work-related control and direction is not exercised by the contractual employer. Moreover, the occurrence of a (genuine) situation of temporary agency work offers a strong presumption that the contractual employer is the legal employer. In that case, the 'indicative value'⁴⁴ of the employment contract is high and questions, like who bears the actual wage costs⁴⁵ and who has the actual power of dismissal, carry less weight, i.e. are insufficient to rebut the presumption that the temporary work agency is the employer. On the other hand, if the assignment does not have a temporary, but a permanent, character, this can be seen as a strong indication that the employer status of the contractual employer does not reflect the reality of the employment relationship.⁴⁶ Permanently assigning an employee to one user undertaking usually gives that undertaking a high degree of authority over that employee. It will often have the actual power of dismissal and bear the actual wage costs. Thus, when identifying the true employer, the temporary or permanent nature of an assignment carries considerable weight.⁴⁷

The situation is clearer in the case of contracting. Contracting is another type of posting which falls under the scope of the PWD. It differs from temporary agency work in the sense that the employees are not assigned to a user undertaking to work there under the control and direction of that undertaking. Instead, the contractual employer continues to manage the employees within his own labour process and subsequently provides a service to the user undertaking.⁴⁸ Employees who move with their employer in a contracting situation do not fall under the scope of the TAWD and are granted less protection than temporary agency workers in the PWD.⁴⁹ The difference in treatment flows from the circumstance that the employees do not work for the user undertaking, but continue to perform their work within the undertaking of their contractual employer. By extension, in cases of contracting the employee's hierarchical relationship normally exists with the contractual employer and not with the user undertaking. The traditional thought is that the identity of the employer should coincide with the owner of the enterprise in which work is performed.⁵⁰ As Coase states in his highly influential *The Nature of the Firm*, the fact of direction

43. Moreover, it seems irrelevant whether the assignment occurs outside or within a corporate group. As regards the PWD, the Court held in the *Danieli* case (*supra* n. 40) that intra-group posting is a special type of agency work to which the same criteria apply. There is no reason to assume this is different for the TAWD. See, in more detail, e.g. Laagland, F.G. & Van Braak, M.J. (2020), 'Uitzending en tijdelijkheid: onlosmakelijk verbonden of niets gemeen?', *Tijdschrift Recht en Arbeid* (13) 3, pp. 10-11; Hamann, W. (2011), 'Die Reform des AÜG im Jahr 2011', *Recht der Arbeit* (12), p. 333.

44. Cf. *AFMB*, para. 61; *AFMB* (Opinion), para. 57.

45. Cf. Art. 1(2) TAWD, which declares the Directive applicable to temporary-work agencies and user undertakings 'whether or not they are operating for gain'.

46. This view is supported by Art. 6 TAWD, which has as its purpose that a temporary agency worker is eventually engaged by the user undertaking, and by the *Albron* ruling (see para. 4.2. *infra*). See also Case C-681/18, ECLI: EU: C:2020:823 (*KG*), in which the Court held that the TAWD obliges the Member States to take measures to preserve the temporary nature of agency work.

47. It can be deduced, *inter alia*, from the Rome I Regulation, TAWD and PWD that the notion of 'temporariness' revolves around the objective of the assignment. In short, as long as the employer expects the worker to work elsewhere after the assignment with the user undertaking, the assignment of that worker to that user undertaking is of a temporary nature.

48. Art. 1(3)(a) PWD; *Danieli* (*supra* n. 40), para. 27 and case law cited; cf. Bartkiw T.J. (2014), 'Labour Law and Triangular Employment Growth: A Theory of Regulatory Differentials', *The International Journal of Comparative Labour Law and Industrial Relations* (30), pp. 414-415.

49. Art. 3(1b) PWD.

50. Corazzo & Razzolini (*supra* n. 2), pp. 4-5, 13-14 and sources cited; Eindrapport van de Commissie Regulering van Werk (*supra* n. 2), p. 42.

can be seen as the essence of the legal concept of employer and employee, just as it is in the economic concept of the enterprise.⁵¹ As a general principle, if the legal entity that exercises the entrepreneurial power of control and direction over the working activity coincides with the legal entity that is formally part of the employment contract, then it is this entity that should be regarded as the employer.⁵² In that case, the question of who bears the wage costs and who has the power of dismissal is less relevant – even less so than with regard to temporary agency work. The main challenge in the case of contracting is ascertaining whether the employee has indeed remained within the labour process of his contractual employer and is not in fact working within the labour organisation (and, thus, under the control and direction) of the user undertaking, i.e. whether it is not, in fact, a situation of agency work.⁵³

The significance of abuse

The third observation concerns the notion of abuse. The Court did not answer the preliminary question on whether the use of the Cyprus route scheme constituted an abuse of EU law. Nevertheless, it did address the notion of abuse, but as part of the assessment whether AFMB qualified as the employer. As support for an objective approach, the Court considered that adopting a purely formalistic approach would be irreconcilable with Regulation 883/2004, for this would make it easier for employers to resort to purely artificial arrangements to exploit the Regulation.⁵⁴ This consideration raises the question of the weight that is attached to the notion of abuse when identifying the employer.

Firstly, an abusive situation is not required to identify a user undertaking as the employer. Abuse in the sense of EU law is limited to situations in which, despite formal observance of the conditions laid down by EU law, the essential purpose of the arrangement is to obtain an undue advantage.⁵⁵ In contrast, in *AFMB* the Court based its findings on all the relevant circumstances. This leaves room to pierce the contractual arrangement without the need to establish abuse. As an example, one can point to the situation in the Netherlands. In the Netherlands, the *AFMB* ruling has important consequences. Dutch law expressly provides companies like AFMB, which engage employees with the sole objective of placing them at the exclusive and permanent disposal of another company, with a legal basis to act as the (sole) employer of the employees concerned.⁵⁶ In the Netherlands, this form of hiring out employees is known as ‘payrolling’. In some situations (like in *AFMB*) the aim of a payrolling construction is to avoid employee-protective provisions of labour law. The *Hoge Raad* (Dutch Supreme Court) ruled that in a case of abuse, the contractual

51. Coase, R.H., ‘The Nature of the Firm’, reprinted in Coase, R.H. (1988), *The Firm, the Market and the Law* (Chicago, University of Chicago Press), p. 54; Deakin (*supra* n. 1), p. 79.

52. See also Corazzo & Razzolini (*supra* n. 2), p. 5; Garofalo, D. (2020), ‘The identification of the employer in the context of organisational fragmentation: the Italian legal framework’, *Italian Labour Law e-Journal* (13) 1, para. 1.

53. Eindrapport van de Commissie Regulerend van Werk (*supra* n. 2), p. 74; Corazzo & Razzolini (*supra* n. 2), pp. 14–15 and sources cited; Lokiec, P. (2017), ‘Externalising the Workforce: Lessons from France’, in Ales, E., Deinert, O. & Kenner, J. (eds.), *Core and Contingent Work in the European Union: A Comparative Analysis* (Oxford, Hart Publishing), p. 77; Garofalo (*supra* n. 52), para. 3.2.

54. *AFMB*, para. 69.

55. See *AFMB* (Opinion), para. 74 and case law cited. The general principle of the prohibition of abuse of EU law is seen more often in the social *acquis*. Recent examples are Case C-359/16, ECLI: EU: C:2018:63 (*Altun*) (Regulation 883/2004) and Case C-664/17, ECLI: EU: C:2019:496 (*Ellinika Nafpigeia*) (Transfer of Undertaking Directive).

56. Art. 7:692 Dutch Civil Code.

arrangement must be pierced and the user undertaking must be considered to be the employer.⁵⁷ However, outside the situation of abuse, Dutch law regards payrolling as a legitimate business strategy. In contrast, it seems that even without an abusive aim, a payrolling company as described above cannot be regarded as the employer within the meaning of *AFMB*, as most (if not all) employer functions are exercised by the user undertaking.⁵⁸ Thus, the *AFMB* test may identify the user undertaking as the employer even if the arrangement is not abusive.

The flip side of the question is, if the aim of the multiparty arrangement is to reduce worker protection, this automatically leads to the conclusion that the user undertaking is the employer. This is not the case. Abuse (within the meaning of EU law) requires, *inter alia*, that the arrangement only formally meets the conditions set out by EU law, i.e. that the contractual employer only formally holds employer status.⁵⁹ This criterion is not met if the contractual employer is the real employer. In other words, even if the objective of the multilateral working arrangement is to reduce worker protection, that arrangement does not constitute abuse within the meaning of EU law if the contractual employer is the real employer.⁶⁰ Nonetheless, establishing that the reduction of worker protection is the essential aim of the contractual arrangement is undoubtedly an indication that the employment contract does not reflect the reality of the employment relationship. Consequently, the notion of abuse is one of the relevant elements the national court should take into account when identifying the employer in Regulation 883/2004.

The concept of employer in EU law: uniformity versus functionality

The various definitions of 'employer' in EU law

The analysis in section 3 concerned the definition of employer within the meaning of Article 13(1)(b) Regulation 883/2004. An important question is to what extent that analysis can be exported to other parts of the EU social *acquis*. Put differently, the question is to what extent the Court created a definition of employer in *AFMB* that is uniform and autonomous throughout EU law. To answer this question, it must be assessed, firstly, to what extent EU law engages with a concept of 'employer' and to what extent defining that concept is an EU or a national competence. The EU social *acquis* consists mostly of minimum Directives that have to be implemented with regard of the conditions and technical rules in each of the Member States.⁶¹ As was already mentioned in the introduction, various social policy Directives, like the Working Time Directive or the Collective Redundancies Directive, connect certain rights or obligations to the status of 'employer'. However, these Directives generally do not define the employer, nor do they expressly

57. Hoge Raad 21 February 2020, ECLI: NL: HR:2020:312.

58. Cf. Art. 4 Enforcement Directive (Directive 2014/67/EU), which stipulates that the PWD does not apply to employers that only perform 'purely internal management and/or administrative activities'. Many payrolling companies fit this glove.

59. *AFMB* (Opinion), para. 74 and case law cited.

60. Cf. *AFMB* (Opinion), para. 40. The Court took a similar approach in Case C-327/92, ECLI: EU: C:1995:144 (*Rheinhold & Mahla*). This case concerned the question whether a third-party liability of a main contractor was an 'obligation of an employer' within the meaning of Regulation 1408/71 (now Art. 3(2) Regulation 883/2004). The Court answered this question in the negative, but added that this could be different in case of fraud, which might be the case if the main contractor was 'in fact the true employer' (para. 31).

61. Art. 153(2)(b) TFEU. Exceptions are the uniform, employment-related choice of law rules that are laid down in Regulations like Regulation 883/2004 and the Rome I Regulation.

refer to the law of the Member States to do so. Since Directives are only binding upon the Member States as to the result to be achieved,⁶² one could argue that it is up to the Member States to attribute the employer obligations laid down in social policy Directives, as long as they ensure those obligations are fulfilled.⁶³ This ‘hands-off’ approach to the concept of employer is clearly reflected in the recent Directive on Transparent and Predictable Working Conditions. Although the Directive acknowledges that several different entities may in practice assume the functions and responsibilities of an employer, it explicitly leaves it up to the Member States to determine which entity or entities should be held wholly or partly responsible for the employer obligations in the Directive, as long as all those obligations are fulfilled.⁶⁴ Interestingly, the Commission Proposal contained a broad definition of the employer (‘one or more natural or legal person(s) who is or are directly or indirectly party to an employment relationship with a worker’),⁶⁵ but this definition was removed from the Directive following negative advice from the European Committee of the Regions; defining the employer was to remain a national matter.⁶⁶ However, in *AFMB* the Court clearly took a different approach. It is settled case law that the need for a uniform application of EU law and the principle of equality require that a provision of EU law, which makes no express reference to the law of the Member States to determine its meaning and scope, must normally be given an independent and uniform interpretation throughout the EU. In *AFMB*, both the Court and the Advocate General applied this formula to the employer concept. As this formula applies to Regulations and Directives equally,⁶⁷ it seems likely that in every social policy Directive that connects certain rights or obligations to the status of ‘employer’, and which does not refer to the law of the Member States to define the concept, that concept must normally be given a European interpretation. This is even more likely since the Court has applied the same formula to give an autonomous meaning to the *worker* concept, and has done so with increasing consistency in different areas of EU law.⁶⁸ Therefore, it is submitted that the *AFMB* ruling cannot be given a narrow scope that is limited to Regulation 883/2004.

Nevertheless, not every Directive is silent on the notion of the employer. Some Directives, like the aforementioned Directive on Transparent and Predictable Working Conditions, do refer to the law of the Member States to define the employer.⁶⁹ The formula used in *AFMB* does not apply to these Directives. Yet, this does not imply that these Directives do not in any way affect who is to be regarded as an employer in the law of the Member State for the purposes of applying the rules laid

62. Art. 288 TFEU.

63. Van Schadewijk M.A.N. (2018), ‘Op zoek naar een visie op Europees werkgeverschap’, *Tijdschrift Recht en Arbeid* (11) 6, p. 10; Zwemmer, J.P.H. (2012), *Pluraliteit van werkgeverschap* (diss. Amsterdam UvA), pp. 42–45. This view is supported by Art. 151 TFEU, which provides that EU social policy measure shall take account of the diverse forms of national practices, ‘in particular in the field of contractual relations’.

64. Preamble 13 jo. Art. 1(5) Directive (EU) 2019/1152.

65. COM/2017/0797 final, Art. 2(1)(b).

66. Opinion of the European Committee of the Regions – Transparent and predictable working conditions in the European Union (2018/C 387/10), Amendment 5.

67. E.g. Case C-201/13, ECLI: EU: C:2014:2132 (*Deckmyn*); Case C-485/17, ECLI: EU: C:2018:642 (*Verbraucherzentrale Berlin*).

68. E.g. Case C-147/17, ECLI: EU: C:2018:926 (*Sindicatul Familia Constanța*), para. 41; Case C-692/19, ECLI: EU: C:2020:288 (*Yodel*), para. 26. See in more detail Laagland, F.G. (2018), ‘Member States’ Sovereignty in the Socio-Economic Field: Fact or Fiction?’, *ELLJ* (9), pp. 62–63.

69. Information and Consultation Directive (Directive 2002/14/EC), Art. 2(c); Insolvency Directive (Directive 2008/94/EC), Art. 2(2).

down in these Directives. Every Directive is binding, as to the result to be achieved, upon each Member State. If the national concept of employer jeopardises the objective of a Directive, the Member State has failed to implement it correctly. Through the preliminary ruling procedure, the Court has the final say on the compatibility of these national interpretations with the purpose of the Directive in question. In other words, the express reference to national law does not mean that the Court may not step in and interpret the employer concept in these Directives autonomously. For example, it cannot be excluded that the Court would interpret the concept of employer in the Directive on Transparent and Predictable Working Conditions, despite the Directive's express reference to the law of the Member States. In support of this view, one can once again point to the increasing tendency of the Court to adopt a uniform worker concept, even in Directives that explicitly reserve the definition of the worker (or employee) to the domestic legal systems of the Member States.⁷⁰

Finally, the EU legislator has defined the term 'employer' on a number of occasions. Interestingly, a first definition of the employer is found in Regulation 883/2004, the Regulation that was under scrutiny in *AFMB*. Article 11(4) Regulation 883/2004 provides a *lex specialis* for the determination of the social security law that is applicable to employed and self-employed seafarers. As the main rule, Article 11(4) refers to the law of the flag of the sea vessel. However, if the seafarer's Member State of residence and the Member State of the registered office of the employer coincide, the social security law of that Member State applies. The employer is defined as 'the undertaking or person paying the [seafarer's] remuneration'. Notions such as authority and a hierarchical relationship are disregarded. This stands in stark contrast with the Court's definition of the employer in *AFMB*. Nevertheless, the sole focus on remuneration in Article 11(4) makes sense. Article 11(4) applies equally to both employed and self-employed seafarers. Self-employment is characterised by the absence of authority and a hierarchical relation. This leaves remuneration as a suitable connecting factor. By extension, the definition of the employer in Article 11(4) seems to be aimed at bringing every type of bilateral, maritime working relationship under the scope of Article 11(4). In other words, the definition may not have been included to attribute employer status in a multiparty arrangement.⁷¹ This would explain why the Court did not refer to Article 11(4) in *AFMB*. Moreover, it opens the possibility that the *AFMB* criteria apply equally, when identifying the employer of a seafarer in a multilateral working relationship, to Article 11(4). In fact, adopting the objective, holistic *AFMB* test seems of particular relevance for seafarers, since intermediary companies who act as employers on paper only are quite common to this sector.⁷²

Besides Article 11(4) Regulation 883/2004, there are two Directives in which the European legislator has defined the employer. In the Framework Directive on Occupational Health and Safety, the employer is defined as 'any natural or legal person who has an employment relationship

70. Laagland (*supra* n. 68), pp. 62-63.

71. To the author's knowledge, the legislative history of Regulation 883/2004 (or any of its predecessors) gives no guidance on the matter.

72. Van der Voet, G. (2019), 'International maritime employment law – About the special legal status of the most globalised of international workers: the seafarer', *NIPR* (36), p. 19; Christodoulou-Varotsi, I. (2009), 'A Maritime Competition Reading Of Regulation 1408/71/EC On The Co-Ordination Of Social Security Systems In The European Union: Is The Current Regime Out-Of-Date?', in: Antapassis, A., Athanassiou, L. & Erik Rosaeg, E. (eds.), *Competition and Regulation in Shipping and Shipping Related Industries* (Leiden/Boston, Martinus Nijhoff Publishers), pp. 213-214.

with the worker and has responsibility for the undertaking and/or establishment'.⁷³ As an additional Directive, Directive 91/383, was adopted to ensure that hired workers (like temporary agency workers) are given the same level of protection as workers employed by the user undertaking,⁷⁴ the employer definition seems to be aimed at the contractual employer.⁷⁵ Secondly, the Employers Sanctions Directive, which aims to combat the illegal employment of third-country nationals, defines the employer as 'any natural person or any legal entity, including temporary work agencies, for or under the direction and/or supervision of whom the employment is undertaken'.⁷⁶ Like the employer definition in Article 11(4) Regulation 883/2004, this definition is not aimed at attributing employer status in multiparty arrangements, but was included to cover every type of employer, like private individuals in their capacity as employers of house cleaners.⁷⁷ Moreover, the Employers Sanctions Directive explicitly defines both temporary work agencies and subcontractors, and not the user undertaking, as employers.⁷⁸ Like in the Framework Directive on Occupational Health and Safety, this offers an indication that the European legislator had a contractual concept of the employer in mind. The importance of these contractual definitions should not, however, be overstated. The recognition of triangular working arrangements in both Directives aims to ensure the protection of the workers in question. Therefore, it cannot be inferred from these definitions that the European legislator actively wanted to limit the concept of employer to the contractual counterparty to the employment contract.⁷⁹ As a result, both Directives leave ample room for the Court to interpret the definition of employer.⁸⁰

The significance of the context and objective of the legislation in question

The preceding analysis shows that the Court has the final say over the meaning of the definition of employer wherever it is used in EU law. Thus, in a way, the notion of employer in EU law can be described as autonomous throughout EU law. However, this does not imply that the definition of employer in every Directive mirrors the definition in *AFMB*. In *AFMB* both the Court and the Advocate General made clear that, even if the employer concept must be given a European meaning, that meaning must take into account the context and the objective of the specific legislation concerned. As said, there was a clear need in *AFMB* to determine the identity of the one 'true' employer, so as to ensure only one single social security system applied. The Court took a similar approach in the *Voogsgeerd* case, which concerned the connecting factor of the 'establishment which engaged the worker' in Article 8 Rome I Regulation. To determine which employer (and, therefore, which establishment) engaged the worker, the Court held that the national court must consider all the objective factors to identify the actual employer. Since both

73. Directive 89/391/EEC, Art. 3(b).

74. Directive 91/383/EEG.

75. *Idem* Ales, E. (2017), 'The 'Risk Approach' in Occupational Health and Safety (with an eye to Italy): Alternative or Complement to the 'Core/Contingent Approach'?', in: Ales, Deinert & Kenner (eds.) (*supra* n. 53), p. 261; Zwemmer (*supra* n. 63), pp. 43-44.

76. Directive 2009/52/EC, Art. 2(e).

77. COM(2007)249 final, p. 9.

78. Art. 2(e) jo. 8 Employers Sanctions Directive.

79. With regard to the Framework Directive on Occupational Health and Safety, Directive 91/383 makes this particularly clear by attributing the core health and safety obligations to the user undertaking.

80. Though with regard to the Framework Directive on Occupational Health and Safety, the obligations Directive 91/383 puts on user undertakings arguably make an autonomous definition of the 'employer' unnecessary.

Voogsgeerd and *AFMB* concerned the issue of a connecting factor that objectively determines which single law system is applicable, it made sense to adopt an objective test in which the one, true employer is identified. A similar approach is conceivable for Directives like the aforementioned Working Time Directive and Employers Sanctions Directive. It is logical to connect the obligations of the ‘employer’ in these Directives to the entity who has the actual authority over the worker, regardless of whether this entity is the contractual counterparty to the employment contract, thereby strengthening the argument that the approach to the employer in *AFMB* is applicable beyond Regulation 883/2004.

However, the same cannot be said of all EU social policy Directives. This is clearly illustrated by the *Albron* case. This case concerned the question of whether a subsidiary of the Heineken group could be regarded as the ‘transferor’ within the meaning of the Transfer of Undertaking Directive in respect of employees who were permanently assigned to that subsidiary by another subsidiary of the group. Article 2(1)(a) defines a transferor as ‘any natural or legal person who, by reason of a transfer (. . .), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business’.⁸¹ The Court qualified the subsidiary to which the employees were permanently assigned as the ‘non-contractual employer’ of the employees and considered that the Transfer of Undertaking Directive does not necessarily require a contractual link with the transferor for employees to benefit from its protection. Accordingly, as the non-contractual employer was the owner of the transferred undertaking to which the employees were permanently assigned, it had to be considered the ‘transferor’ in respect of those employees.

There are important differences between the approach in *AFMB* (and *Voogsgeerd*) and that in *Albron*. In *Albron*, the Court did not identify the one ‘true’ employer but embraced the existence of a non-contractual employer alongside a contractual employer. By extension, the non-contractual employer status of the subsidiary of the Heineken group was not based on an objective assessment of all relevant circumstances. Instead, it was sufficient that the employees were permanently assigned there.⁸² As the context and the objective of the Transfer of Undertaking Directive differs from that of Regulation 883/2004, these differences are unsurprising. The Transfer of Undertaking Directive aims to protect employees in the event of a transfer of the economic entity in which they perform their work. It is an example of legislation in which it is not the identity of the employer that matters, but rather the link of the employee to the economic organisation (here: the economic entity) within which work is performed.⁸³ To establish this link, it is not necessary to assess whether the owner of the economic entity is the employer of the employee, but rather that the employee forms part of the economic entity. This criterion is met in case of permanent assignment. In conclusion, the different context and objective of the Transfer of Undertaking Directive as opposed to Regulation 883/2004 prevent the exportation of the employer definition in *AFMB* to that Directive. Put differently, the Court’s interpretation of the employer in *AFMB* has not superseded the *Albron* ruling.

81. In some of the official language versions of the Directive (four out of thirteen), reference is not made to the ‘employer’ but to the ‘entrepreneur’. In *Albron*, the Court used both terms interchangeably.

82. It is submitted that the circumstance that the assignment occurred within a corporate group did not carry considerable weight; cf. *supra* n. 43 and see in more detail e.g. Zwemmer (*supra* n. 63), pp. 210-212; Willemsen, H.J. (2011), ‘Erosion des Arbeitgeberbegriffs nach der Albron-Entscheidung des EuGH?’, *Neue Juristische Wochenschrift* (64), p. 1550.

83. *Idem* Corazzo & Razzolini (*supra* n. 2), pp. 4-5; Kühn, T. (2011), ‘Der Betriebsübergang bei Leiharbeit’, *Neue Juristische Wochenschrift* (64), pp. 1410-1411.

A functional approach

The preceding section shows that, although the concept of employer can be described as autonomous throughout EU law, there is no single definition of employer in EU law. Instead, the definition of employer may, depending on the content and objective of the legal provision in question, be different in different parts of EU law. As a result, different entities may be responsible for different EU employer obligations.⁸⁴ In other words, the approach to the employer in EU law is a 'functional' or 'purposive' one. Though the exact extent of this functional approach remains to be seen, it can be inferred from the abovementioned cases that account should be taken of whether the legislation focuses on the identity of the 'employer' (in which case the *AFMB* criteria may come into play) or on that of the 'organisation' in which work is performed. In the case of the latter, it is not the establishment of authority that matters for the identification of the employer, but the existence of a durable link between the worker and the organisation in question.

An example of how this functional approach could work in practice is found in the Collective Redundancies Directive. This Directive obliges employers who are contemplating collective redundancies to consult workers' representatives with a view to try and prevent collective dismissals or to mitigate their social consequences. Whether redundancies must be regarded as 'collective' depends, *inter alia*, on the number of workers that are 'normally employed' in the establishment where the redundancies take place.⁸⁵ An important question is whether hired workers (like agency workers), who are assigned to an establishment without being formally employed by the owner of that establishment, count as workers 'normally employed' in that establishment. In 2017, the *Bundesarbeitsgericht* (German Supreme Court for labour law cases) referred this question to the Court. In particular, it wondered whether agency workers would count as such if they were assigned to the establishment on a permanent basis.⁸⁶ Unfortunately, the questions were withdrawn as the parties ended the procedure before the *Bundesarbeitsgericht* before the Court could deliver its judgment.⁸⁷ Nevertheless, on the basis of the functional concept of the employer as set out above, it can be deduced that permanently assigned workers are indeed 'normally employed' in the establishment of a user undertaking. The Court interprets the concept of 'workers normally employed in an establishment' broadly, to ensure that atypical working arrangements are not used to circumvent the Collective Redundancies Directive. Every worker, who is in fact normally employed in an establishment, is to be counted.⁸⁸ Moreover, the 'establishment' is

84. Another example of a functional approach is found in the cases *Lawrence* (Case C-320/00, ECLI: EU: C:2002:498) and *Allonby* (Case C-256/01, ECLI: EU: C:2004:18). These cases concern the question whether, for the purposes of EU equal treatment law, a comparison can be made between employees employed by different employers. The Court held that the prohibition of discrimination is not limited to unequal treatment of employees who are employed by the same employer. Instead, it is decisive whether the inequality can be attributed to a 'single source' that can restore equal treatment. Although the Court interpreted the single source concept rather narrowly in both cases (see e.g. Fredman, S. (2004), 'Marginalising Equal Pay Laws', *Industrial Law Journal* (33), pp. 281-282), it recognised that EU equality law may pierce the identity of the contractual employer. However, this is a characteristic that is inherent to EU equal treatment law. It prohibits, for example, not only discriminatory policies of employers but also discrimination that flows directly from legislative provisions or collective labour agreements. Therefore, it is submitted that these cases do not shed light on the interpretation of the concept of 'employer'.

85. Art. 1(a)(i) Collective Redundancies Directive.

86. *Bundesarbeitsgericht* 16 November 2017, 2 AZR 90/17 (A); Request for a preliminary ruling from the *Bundesarbeitsgericht* (Germany) lodged on 30 January 2018 (Case C-57/18).

87. Order of the President of the Court of 17 May 2018, Case C-57/18, ECLI: EU: C:2018:380.

88. Case C-422/14, ECLI: EU: C:2015:743 (*Pujante Rivera*), paras. 34-41 and case law cited.

defined by the Court as the unit to which workers ‘are assigned to carry out their duties’.⁸⁹ On the basis of these considerations, it does not seem necessary that the owner of the establishment is the legal employer of a worker for that worker to be ‘normally employed’ there. As with the Transfer of Undertaking Directive, it is not the existence of a hierarchical relationship that matters, but the link of the worker to the economic organisation (here: the establishment). Accordingly, the approach in *Albron* can be exported to the Collective Redundancies Directive: workers who are permanently assigned to an establishment can be attributed to that establishment and must therefore be considered to be ‘normally employed’ there.⁹⁰

The significance of a functional definition of the employer in the Collective Redundancies Directive does not end there. Besides the number of workers that are normally employed in the establishment, the question of whether redundancies must be regarded as ‘collective’ depends on the amount of redundancies in that establishment. Article 1(1)(a) of the Directive defines redundancies as ‘dismissals effected by an employer for one or more reasons not related to the individual workers concerned’. On the basis of this definition, the *Bundesarbeitsgericht* assumed in the aforementioned German case that user undertakings cannot ‘dismiss’ agency workers within the meaning of the Directive, even in case of permanent assignment, due to the absence of an employment contract between them.⁹¹ The correctness of this assumption may be doubted. On the basis of the reasoning set out above, a user undertaking can be qualified as the ‘non-contractual’ employer of permanently assigned workers for the purpose of the Collective Redundancies Directive.⁹² Secondly, the concept of ‘dismissal’ in EU law is not limited to formal terminations of the employment contract. In recent years, the Court has extended the definition of dismissal to include the situation in which an employer unilaterally makes significant changes to essential elements of an employment contract.⁹³ A similar approach is found in the Directive on Transparent and Predictable Working Conditions, where ‘measures having equivalent effect’ are assimilated to dismissals.⁹⁴ In short, the concept of dismissal in EU law seems to correspond to a significant and substantial disadvantage for the worker, in which the actual effect of the measure takes precedence over the formal qualification.⁹⁵ Terminating a permanent assignment means separating a worker from his habitual place of work. This can be seen as a substantial disadvantage for the worker, particularly since, if the worker cannot be redeployed elsewhere, the loss of the assignment will

89. Case C-449/93, ECLI: EU: C:1995:420 (*Rockfon*), para. 32.

90. Cf. Bayreuther, F. (2016), ‘Der Leiharbeitnehmer im Kündigungsrecht’, *Neue Zeitschrift für Arbeitsrecht* (33), p. 1306.

91. *Bundesarbeitsgericht* 16 November 2017, 2 AZR 90/17 (A), para. 23. *Idem* Bayreuther (*supra* n. 90), p. 1306.

92. This view is supported by the *Akavan* case (Case C-44/08, ECLI: EU: C:2009:533) where the Court defined the employer within the meaning of the Collective Redundancies Directive as ‘a natural or legal person who stands in an employment relationship [emphasis added] with the workers who may be made redundant’ (para. 57). The *Akavan* case concerned a mother company which did not fit that model. The fact that it could take decisions that were binding on the daughter company did not give it the status of employer (para. 58).

93. *Pujante Rivera*; Case C-149/16, ECLI: EU: C:2017:708 (*Socha*); Case C-429/16, ECLI: EU: C:2017:711 (*Ciupa*). The Court applies a similar, broad approach to the concept of dismissal in the Insolvency Directive; Case C-57/17, ECLI: EU: C:2018:512 (*Checa Honrado*).

94. Art. 18 Directive on Transparent and Predictable Working Conditions. This provision concerns the protection against dismissal of workers who have made use of the rights set out in this Directive.

95. Conclusion of Advocate General Kokott to the *Pujante Rivera* case (ECLI: EU: C:2015:544), para. 54; Laagland F.G. & Lintsen I. (2020), ‘De Europese invloed op fundamente van het Nederlandse arbeidsrecht: het ondeelbaarheidsbeginsel op de schop?’, *Tijdschrift Recht en Arbeid* (13) 8/9, p. 10. See also COM(92)127 final, p. 2: ‘The [Collective Redundancies] Directive covers not only “dismissals” in the legal sense of the term but also job losses in other circumstances’.

likely lead to the termination of the employment contract by the contractual employer. In conclusion, it is submitted that when a user undertaking terminates the assignment of a permanently assigned worker, this termination qualifies as a dismissal by the (non-contractual) employer within the meaning of the Collective Redundancies Directive.

The scope for diverging national interpretations of the employer

Finally, an important question is, if the notion of ‘employer’ in EU law is indeed an autonomous concept, what scope do Member States have to adopt or maintain a diverging definition of the employer when applying or implementing EU law? As regards the objective conflict of law Regulations, these Regulations are binding in their entirety and leave no room for diverging national interpretations.⁹⁶ The same cannot be said of social policy Directives. All social policy Directives aim to protect, *inter alia*, the social rights of workers.⁹⁷ When implementing these Directives, the Member States may not diverge from the EU approach to the concept of the employer, if doing so is to the disadvantage of the worker. On the other hand, the minimum character of social policy Directives leaves the Member States free to extend the definition of the employer to increase the protection of the workers concerned. For example, for the purpose of attributing the employer obligations laid down in the Framework Directive on Occupational Health and Safety, some Member States (e.g. Italy, the Netherlands) define the owner of the undertaking in which work is performed as the ‘employer’, regardless of the existence of an employment contract with the workers employed there.⁹⁸ This goes further than the system envisaged by the Framework Directive on Occupational Health and Safety and Directive 91/383/EEG (see *supra* section 4.1) but increases the protection of the workers concerned, as it ensures that the entity responsible for ensuring health and safety in the workplace is the entity who has the actual authority over that workplace.

However, the minimum character of social policy Directives does not imply that the freedom of Member States to extend their approach to the employer is unlimited. Over the years, it has become clear that national labour law must conform with the market freedoms as laid down in the TFEU and the freedom to conduct a business as laid down in Article 16 of the Charter of Fundamental Rights of the EU (hereafter: ‘CFREU’). These limits apply, irrespective of whether the national legislation falls in or outside the scope of a European Directive.⁹⁹ Although extending the scope of the concept of the employer is undoubtedly a legitimate means to ensure a certain level of worker protection, an overly extensive interpretation of the concept of the employer runs the risk of conflicting with the limits set by these economic rights.¹⁰⁰ In this regard, two particular risks are identified.

96. Nevertheless, the significance of an autonomous concept of the employer in these Regulations must not be overstated. The choice of law rules in these Regulations generally only determine the applicable national law and do not determine the material content of that law. As such, the qualification of an entity as ‘employer’ for the purpose of determining the applicable law does not automatically mean that the employer status of that entity falls within the scope of the applicable national law. For instance, although Dutch social security law applied to the drivers in *AFMB*, Dutch social security law may still identify *AFMB* as the employer, with the result that not the Dutch transport companies, but *AFMB*, would be obliged to pay social security contributions in the Netherlands.

97. Art. 151 TFEU. This is no different for social policy Directives that were enacted on a different legal basis (like Art. 115 TFEU), like the Transfer of Undertaking Directive.

98. Zwemmer (*supra* n. 63), pp. 43, 53-56; Ales (*supra* n. 75), pp. 261-262.

99. See, in more detail, Laagland (*supra* n. 68), pp. 63-67.

100. For a similar risk with regard to the *worker* concept, see Laagland (*supra* n. 68), pp. 63-64.

First, identifying the user undertaking as the employer in a situation of cross-border posting may conflict with the freedom to provide a service (Article 56 TFEU). This becomes particularly clear when taking a closer look at the PWD. The PWD regulates which law applies to the employment contract of cross-border posted workers within the EU. It is not based on the free movement of workers but on the freedom of employers to provide a service in another Member State, for the purpose of which the employer temporarily posts one or more of his workers to that State.¹⁰¹ The PWD strikes a balance between the freedom of services and the legitimate interest of the receiving Member State to guarantee a minimum level of working conditions to all workers employed on its territory.¹⁰² In contrast, labelling the user undertaking (the entity that receives the service) as the employer brings the worker under the full scope of the labour law of the receiving State,¹⁰³ thereby evading the carefully constructed balance of the PWD.¹⁰⁴ This jeopardises the useful effect of the PWD and, by extension, restricts the freedom of services. So, what limits do the freedom of services and the PWD impose on the national definition of employer in the case of cross-border posting? The answer to this question may be found in Article 1(3) PWD. Article 1(3) PWD stipulates that the applicability of the PWD is conditional on ‘the existence of an employment relationship between the undertaking making the posting and the worker during the period of posting’.¹⁰⁵ Though it concerns different pieces of EU legislation, this wording is reminiscent of the posting provision of Article 12(1) Regulation 883/2004, from which the Court drew heavy inspiration to define the employer in *AFMB*. With this in mind, it may be argued that the Court’s definition of employer in *AFMB* applies to the concept of ‘employment relationship’ in the PWD. This would mean that if the user undertaking is the employer within the meaning of *AFMB*, the PWD does not apply and the receiving Member State is free to identify the user undertaking as the employer for the purpose of its national law. On the flip side of the coin, if the *AFMB* criteria do *not* identify the user undertaking as the employer, the Member States are not competent to do so either (as far as the posting occurs within the framework of providing a cross-border service). In a series of landmark cases – the most famous being the *Laval* ruling¹⁰⁶ – the Court ruled that the level of protection established by the PWD is to be understood as a ceiling for the protection awarded to posted workers, as conditions going above or beyond those of the PWD would constitute unjustified restrictions of the freedom of services. By extension, it may be argued that a Member State that goes beyond the definition of employer as interpreted by the Court in *AFMB* exceeds the

101. In case of temporary agency work, the posting of the worker(s) is the service; *Danieli* (*supra* n. 40), para. 27 and case law cited.

102. For a more detailed account of the background to the PWD, see Rocca, M. (2015), *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights* (Antwerp, Intersentia), pp. 113-142.

103. Assuming that the employment relationship between the worker and the user undertaking is limited to the work performed for the user undertaking in the receiving Member State, the law of that State will apply to their employment relationship, on the basis of Art. 8(2) and 10(1) Rome I Regulation.

104. The PWD does not apply if the posted worker has an employment contract with the user undertaking; COM(2002)654 final, pp. 36-37.

105. See also Case C-16/18, ECLI: EU: C:2019:1110 (*Dobersberger*), para. 29; *Danieli* (*supra* n. 40), para. 25; Case C-307/09, ECLI: EU: C:2011:64 (*Vicoplus*), para. 44; Case C-346/06, ECLI: EU: C:2008:189 (*Rüffert*), para. 19. The PWD also applies if the worker is posted *indirectly* by his employer to the receiving State, i.e. by an undertaking to which the worker has been posted; *Danieli* (*supra* n. 40), para. 30 ff.; Opinion of Advocate General Szpunar in the *Dobersberger* case (ECLI: EU: C:2019:638), paras. 76-83.

106. Case C-341/05, ECLI: EU: C:2007:809 (*Laval*).

ceiling of worker protection allowed by the PWD¹⁰⁷ and therefore unjustifiably restricts the freedom of services.¹⁰⁸

Secondly, the market freedoms may restrict the scope of the concept of the employer in national law provisions that fall *outside* the scope of a European Directive. In this regard, it is relevant to consider the national approach to the concept of the employer in *corporate groups*. With regard to corporate groups, several Member States (e.g. France, Belgium, Italy, Spain) take a broad approach to the concept. If certain criteria are met (e.g. the mother company exercises a high level of control over its daughter company), the mother company is regarded as the ‘co-employer’ of the employees of the daughter company. As a result, the corporate veil is pierced and the mother company is directly and jointly responsible for all or for specific employer obligations, like paying redundancy payments or reinstating workers who are unlawfully dismissed.¹⁰⁹ Piercing the corporate veil, specifically the principle of limited liability, runs the risk of conflicting with the market freedoms, specifically the freedom of establishment (Article 49 TFEU).¹¹⁰ The freedom of establishment aims to guarantee, *inter alia*, that mother companies can freely establish themselves, through their daughter companies, throughout the EU.¹¹¹ Piercing the corporate veil by identifying a foreign mother company as ‘co-employer’ is likely to restrict this freedom, in particular since the principle of limited liability is often an important motive for establishing a daughter company in another Member State.¹¹² In that case, it must be assessed whether co-employment is a suitable and necessary restriction of free movement. In this regard, the development of co-employment in France is of particular interest. In France, to be recognised as co-employer, the employees must establish either the existence of a relation of subordination, or a ‘confusion of activity, direction and interest’ between the mother company and the subsidiary. With this second criterion, it is

107. The same cannot be said of the TAWD. Although Art. 4 TAWD contains a general prohibition on restrictions of temporary agency work, this provision (and, by extension, the TAWD) does not seem to oblige Member States to remove such restrictions; see Case C-533/13, ECLI: EU: C:2015:173 (*AKT*) and the analysis of that judgment in Davies, A.C.L. (2016), ‘The legal nature of the duty to review prohibitions or restrictions on the use of temporary agency work: *AKT*’, *Common Market Law Rev.* (53), pp. 493-508. Nevertheless, it cannot be excluded that the Court would rule that identifying the user undertaking as the employer in a situation of temporary agency work interferes with the useful effect of the TAWD, specifically when interpreted in light of Art. 16 CFREU, which encompasses, *inter alia*, the freedom of contract, including the freedom to choose with whom to do business; Case C-283/11, ECLI: EU: C:2013:28 (*Sky Österreich*), para. 43.

108. This does not imply that the receiving Member State may not attribute *specific* employer obligations to the user undertaking. This is illustrated by the *Wolff & Müller* case (Case C-60/03, ECLI: EU: C:2004:610), in which the Court allowed the receiving State to hold sub-contractors jointly liable for the payment of the minimum wage. On the basis of Art. 3(1)(a) PWD, the posted worker is entitled to the minimum wage (since the revision: remuneration) of the receiving State. The Court held that the joint liability objectively ensured the protection of the posted worker and was therefore a suitable measure to enforce the PWD and, thus, a proportionate restriction of the freedom of services.

109. For different examples in national law, see Lokiec (*supra* n. 53), pp. 77-79; Lailom, S. (2017), ‘Reconsidering the Notion of ‘Employer’ in the Era of the Fissured Workplace: Responses to Fissuring in French Labour Law’, in: Blanpain & Hendrickx (eds.) (*supra* n. 2), pp. 138-139; Álvarez Alonso, D. (2017), ‘Labor Law and “Atomization of Work”: Legal Responses to the “Fissured Workplace” in Spain’, in: Blanpain & Hendrickx (eds.) (*supra* n. 2), pp. 164-165; Wouters, M. (2019), ‘The classification of employment relationships in Belgium’, *ELLJ* (10), pp. 215-216.

110. Case C-81/09, ECLI: EU: C:2010:622 (*Idryma Typou*); see also Schön W. (2000), ‘Zweigniederlassung und Tochtergesellschaft - ein Grundsatz des Europäischen Unternehmensrechts’, *Europäisches Wirtschafts- und Steuerrecht* (7), pp. 281-291; Sørensen K.E. (2015), ‘Groups of companies in the case law of the Court of Justice of the European Union’, *Nordic & European Company Law LSN Research Paper Series*, No. 15-02, pp. 25-28.

111. Case C-170/05, ECLI: EU: C:2006:783 (*Denkavit*); Case C-201/15, ECLI: EU: C:2016:972 (*AGET Iraklis*).

112. Bartman, S.M., Dorresteyn, A.F.M. & Olaerts, M. (2016), *Van het concern* (Deventer, Kluwer), pp. 12-13.

possible for employees to bring employment claims against a mother company without having to prove a hierarchical relationship with the mother company.¹¹³ Through a permissive interpretation of the word ‘confusion’, the French courts interpreted the concept of co-employment broadly for several years. For example, co-employment was accepted on the basis that the directors of the subsidiary came from the group and that the foreign mother company had taken managerial decisions affecting the future of the subsidiary.¹¹⁴ As these are circumstances that are common to many corporate groups, it became unclear to what extent corporate groups could extend their group policies to French subsidiaries without accruing employer liabilities.¹¹⁵ It can be argued that such an expansive approach to co-employment unjustifiably restricts the freedom of establishment. Having a certain degree of control over subsidiaries is inherent to corporate groups. More importantly, it is a precondition for shareholders (including mother companies) to fall under the scope of the freedom of establishment.¹¹⁶ With this in mind, connecting multiple employer obligations to the mere exercise of that control arguably disproportionately favours worker protection over the principle of limited liability. Moreover, the explicit disregard of a link of subordination between the mother company and the employee does not sit well with the Court’s emphasis on the existence of a hierarchical relationship in *AFMB*.¹¹⁷ From a free movement perspective, it can therefore be seen as a positive and necessary development that the *Cour de Cassation* (French Supreme Court) decided that co-employment cannot be established on the basis of the coordination and supervision of economic actions and decisions alone. To reassure corporate groups, it limited co-employment to ‘abnormal relationships’ between mother companies and subsidiaries, in which the subsidiary acts as a mere establishment deprived of any decision-making authority and management powers.¹¹⁸ In these circumstances, establishing co-employment can be seen as a suitable and proportionate restriction of the freedom of establishment. The circumstances mirror the situation in which the mother company has set up an establishment instead of a daughter company, in which case (since an establishment lacks legal personality) the mother company will have acted as the legal employer of the employees.

Conclusion

This contribution analysed the outlines of the concept of the employer in EU law. The *AFMB* decision can be seen as a first step towards an autonomous, European concept of the employer. This concept can be described as ‘uniform in its functionality’: in EU law, the national concept of the employer is never absolute, but the circumstances and the way in which the national concept must be set aside depend on the context and the objective of the European legislation in question. As a first step to identify the employer in a provision of EU law, it can be inferred from the existing

113. *Cour de Cassation* 25 September 2013, No. 12-14.353.

114. Toulouse Court of Appeal 7 February 2013, No. 12-04.150.

115. Ottoway, C. & Harang, G-L. (2015), ‘Should We Really Be Afraid of Co-employment in Groups of Companies from a French Legal Perspective?’, *International Corporate Rescue* (12), pp. 291-292.

116. *Idryma Typou* (*supra* n. 110), paras. 47-51 and case law cited.

117. This view is supported by the *Akavan* case (*supra* n. 92), where the Court held, for the purpose of the Collective Redundancies Directive, that the fact that a mother company can take decisions that are binding on the daughter company does not give that mother company the status of employer (para. 58).

118. *Cour de Cassation* 2 July 2014, No. 12-15.208; *Lokiec* (*supra* n. 53), p. 78; *Laulom* (*supra* n. 109), p. 139.

case law that account should be taken of whether the legislation in question focuses on the identity of the ‘employer’ or on that of the economic organisation in which work is performed.

The Court’s functional approach to the employer reinforces the recognition in many Member States that the contractual approach to the employer is not absolute. More specifically, it supports the growing argumentative discourse that, since employer functions can be shared between entities, employer obligations should be attributed accordingly.¹¹⁹ Moreover, *AFMB* demonstrates that Member States should not underestimate the significance of EU law when defining or rethinking their approach to the employer. To define the employer, each Member State has so far struck its own balance between the freedom of contract and the principle that substance should prevail over form. The outcome of this balancing act differs for each Member State, which relates, in particular, to diverging degrees of acceptance of multiparty working arrangements.¹²⁰ EU law partly harmonises the outcome of these balancing exercises. The EU social *acquis* sets minimum requirements for when substance should prevail over form. At the same time, the market freedoms limit the competence of the Member States to adopt an overly extensive approach to the employer. Thus, to some extent EU law sets both an upper and lower limit to the concept of employer in national law.

Yet – and as a final note of thought – it can be deduced from the existing case law that these limits should not be overstated. Although this contribution has put forward several more specific viewpoints, the Court’s definition of the employer in *AFMB* is relatively vague. Other than that purely artificial arrangements are not accepted and that regard should be had of ‘all relevant circumstances’, national courts retain a certain degree of latitude in deciding who they consider to be the ‘true’ employer within the meaning of Regulation 883/2004. Similarly, the Court did not explain in *Albron* when an assignment is to be considered ‘permanent’ for the purpose of attributing an employee to a user undertaking. Though the lack of specific guidance is understandable in light of the facts of the particular cases, the result is that it is up to national courts to further interpret a European definition of the employer (or ask an additional preliminary question). This leads to legal uncertainty. Moreover, it may entice national courts to colour a European definition of the employer in light of their own, national views.¹²¹ As a result, despite the Court’s pursuit of an autonomous employer concept, different interpretations of that concept can be upheld, which in turn may lead to diverging levels of worker protection throughout the EU. This goes for the minimum requirements set by the EU social *acquis*, but also blurs the outer limits posed by the market freedoms, since the Court’s interpretation of the employer in EU labour law may impact its stance on national employer definitions in light of the market freedoms (particularly in the context of cross-border posting). In this light, it is desirable that, when the Court decides to give the concept of employer in a provision of EU law an autonomous interpretation, the Court defines that concept as specifically as possible. Only then may the true extent of the European concept of the employer reveal itself.

119. See, notably, Prassl (*supra* n. 2); Hauben, Lenaerts & Kraatz (*supra* n. 8), pp. 7-8.

120. Corazza & Razzolini (*supra* n. 2), p. 5-9, 14; Ratti, L. (2009), ‘Agency Work and the Idea of Dual Employership: A Comparative Perspective’, WP CSDLE ‘Massimo D’Antona’.INT-68/2009, p. 9 ff.

121. This tendency may be visible with regard to the *Albron* ruling (*supra* n. 3), which is not interpreted the same in each Member State; see e.g. Beltzer, R.M. (2015), ‘Intraconcerndetachering’, in: Beltzer, Laagland & Van den Berg (*supra* n. 10), pp. 42-49; Hamann, W. (2018), ‘AÜG § 1’, in: Schüren, P. & Hamann, W. (eds.), *Arbeitnehmerüberlassungsgesetz* (München, C.H. Beck), paras. 265-266.

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